

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY 18 2011

Federal Communications Commission
Office of the Secretary

In re)
)
MARITIME COMMUNICATIONS/LAND) EB Docket No. 11-71
MOBILE, LLC) File No. EB-09-IH-1751
) FRN: 0013587779
)
Participant in Auction No. 61 and Licensee of)
Various Authorizations in the Wireless Radio)
Services)
)
Applicant for Modification of Various) Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services) 0004144435, 0004193028, 0004193328,
) 0004354053, 0004309872, 0004310060,
) 0004314903, 0004315013, 0004430505,
Applicant with **ENCANA OIL AND GAS (USA),**) 0004417199, 0004419431, 0004422320,
INC.; DUQUESNE LIGHT COMPANY; DCP) 0004422329, 0004507921, 0004153701,
MIDSTREAM, LP; JACKSON COUNTY) 0004526264, 0004636537,
RURAL MEMBERSHIP ELECTRIC) and 0004604962
COOPERATIVE; PUGET SOUND ENERGY,)
INC.; ENBRIDGE ENERGY COMPANY,)
INC.; INTERSTATE POWER AND LIGHT)
COMPANY; WISCONSIN POWER AND)
LIGHT COMPANY; DIXIE ELECTRIC)
MEMBERSHIP CORPORATION, INC.;)
ATLAS PIPELINE – MID CONTINENT, LLC;)
DENTON COUNTY ELECTRIC)
COOPERATIVE, INC. , DBA COSERV)
ELECTRIC; AND SOUTHERN CALIFORNIA)
REGIONAL RAIL AUTHORITY)

To: The Commission

ENFORCEMENT BUREAU'S CONSOLIDATED COMMENTS
ON SHOWINGS FILED PURSUANT TO FOOTNOTE 7

1. On May 9, 2011, Southern California Regional Rail Authority ("SCRRA") filed with the Commission a pleading entitled Showing Pursuant to Footnote 7 ("Showing"). On May 12, 2011, Maritime Communications/Land Mobile, LLC ("Maritime") filed with the Commission a pleading entitled Showing Pursuant to Footnote 7 and Statement in Support ("Maritime Showing").

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2. By way of background, the Commission commenced the above-captioned hearing proceeding with its release of *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, FCC-11-64, rel. April 19, 2011 (“HDO”). The HDO requires the presiding Administrative Law Judge (“the Presiding ALJ”) to determine ultimately whether Maritime is qualified to be and remain a Commission licensee and consequently whether its pending applications should be denied and its licenses should be revoked. The footnote to which SCRRA’s and Maritime’s pleadings relate is contained in the HDO.¹

3. There are two applications among those designated for hearing in EB Docket No. 11-71 that involve SCCRA – first, an application for Commission consent to the assignment of a partitioned portion of the spectrum assigned to Station WQGF318 from Maritime to SCRRA and second, a related application to allow operation of the partitioned spectrum by SCRRA as a Private Mobile Radio Service, rather than as a Commercial Mobile Radio Service.² SCRRA, which operates Metrolink, a commuter rail service in Southern California, has stated that it intends to use the spectrum that it acquires from Maritime to comply with the Rail Safety Improvement Act of 2008 (“RSIA”). The RSIA requires, among other things, the implementation of Positive Train Control (“PTC”) systems and other safety controls that would allow automatic braking and help prevent train collisions. At footnote 7 of the HDO, the Commission specifically noted the potential safety of life considerations involved in implementing PTC systems under the RSIA and stated, “we will, upon an appropriate showing . . . consider whether, and if so, under what terms and conditions, the public interest would be served by allowing the [SCRRA] application to be removed from the ambit of this Hearing

¹ Footnote 7 of the HDO refers to SCRRA as “Metrolink.” The two are synonymous.

² See File Nos. 0004144435 and 0004153701.

Designation Order.”³

4. In its Showing, SCRRA asks the Commission to remove its two pending applications from the HDO and grant them (along with a related waiver request) at the earliest possible time.⁴ In support, SCRRA argues that *first*, in an effort to address public rail safety concerns arising from a deadly train collision in September 2008, the RSIA mandates the development and implementation of PTC systems by December 31, 2015; *second*, the federal mandate to implement PTC requires that a carrier’s PTC system be interoperable with other railroad carriers that operate on the same tracks; *third*, there is limited availability of the spectrum SCRRA needs in order for its PTC system to be interoperable with other major rail operators in Southern California; and *fourth*, the only practical means by which SCRRA could timely implement PTC and meet the interoperability requirement is to purchase a partitioned block of Maritime’s A-Block AMTS geographic-area license in Southern California. The Maritime Showing asserts many of these same points in support of SCRRA’s Showing.

5. Based upon the supporting factors advanced by SCRRA and Maritime, the Bureau believes that SCRRA and Maritime have adequately demonstrated that the public interest would be served by removing SCRRA’s PTC-related applications from the ambit of the HDO.

SCRRA’s applications are unique among those designated for hearing in the HDO in that they

³ SCRRA acknowledges at footnote 1 that its Showing is directed to the Commission, rather than the Presiding ALJ in EB Docket No. 11-71. The Maritime Showing is similarly directed to the Commission and not to the Presiding ALJ in EB Docket No. 11-71. The Bureau believes that the language of footnote 7, particularly its reference to “we will, upon an appropriate showing . . . consider,” could arguably be construed as allowing SCRRA and Maritime to submit their respective pleas for relief directly to the Commission without seeking leave to do so from the Presiding ALJ under a modified caption. Nevertheless, because SCRRA’s and Maritime’s pleadings unquestionably relate directly to the hearing in EB Docket No. 11-71 and should be made a part of the record in that proceeding, the Bureau’s instant Comments bear the same caption as that in EB Docket No. 11-71.

⁴ In its Showing, SCRRA seeks removal of two applications from the HDO (File Nos. 000414435 and 0004153701). Footnote 7 of the HDO refers to the removal of only one of SCRRA’s applications – the application for assignment (File No. 000414435). Thus, it may initially appear that SCRRA is seeking to remove from the hearing an additional application that was not contemplated by the Commission in footnote 7. However, SCRRA’s second and related application (File No. 0004153701) requests modification of certain rules for the same spectrum that is the subject of SCRRA’s application for assignment. Thus, the two applications are related. If the Commission

alone contemplate the use of spectrum for the narrow-but-compelling purpose of implementing Congressionally-mandated safety redundant systems designed to protect the public from catastrophic train-to-train collisions and overspeed derailments caused by human performance failures on the nation's railroads.⁵ Indeed, between 1997 and 2007, the National Transportation Safety Board investigated more than 50 rail accidents where PTC would likely have prevented the accident and the resulting seven fatalities and 55 injuries.⁶ Clearly, the Commission was aware of the nature of *all* of the applications designated for hearing in the HDO, including those assignment applications contemplating the use of spectrum by proposed assignees engaged in critical infrastructure industries such as public utilities. After careful consideration, the Commission determined that it would be in the public interest to consider removing from the ambit of the HDO only those contemplating the use of spectrum for PTC purposes upon an appropriate showing. Given the undeniable safety-of-life considerations inherent in SCRRRA's applications and the necessity of placing into service SCRRRA's PTC system in a timely manner, the Bureau believes the public interest would be served by allowing the SCRRRA applications to be removed from the ambit of the HDO, as contemplated in footnote 7 thereof.

6. Notwithstanding this belief, the Bureau takes no position with regard to whether SCRRRA's applications should be granted. In the event the Commission (or WTB, by delegated authority) determines that it is in the public interest to grant SCRRRA's applications, such a grant should be expressly conditioned, as both SCRRRA and Maritime agree, upon the deposit of all proceeds from the proposed transaction between SCRRRA and Maritime into an escrow account. The terms of the escrow agreement should be reviewed and approved by the Commission in

determines that the assignment application should be removed from the ambit of the HDO, the Bureau submits that the related modification application also should be removed.

⁵ See S. Rep. No. 110-270 at 5 (2008); *see also* H.R. Rep. No. 110-336 at 31, 43 (2007).

⁶ See H.R. Rep. No. 110-336 at 44 (2007); *see also* S. Rep. No. 110-270 at 5 (2008).

advance. In addition, the Commission should be made a party to this escrow agreement and the proceeds should be held in escrow until such time as the hearing proceeding in EB Docket 11-71 is resolved through all administrative and judicial appeals with finality. Such conditions will assure that the broad deterrent effect of the Commission's *Jefferson Radio* policy⁷ is not materially diminished while still allowing SCRRA to acquire the spectrum it needs for PTC-related purposes.⁸

7. In its Showing, SCRRA also requests that the Commission stay the hearing proceeding in EB Docket No. 11-71 insofar as SCRRA's applications are concerned if, by June 15, 2011, the Commission does not act favorably on SCRRA's request to remove its PTC-related applications from the HDO and grant them. June 15, 2011 is the date set by the Presiding ALJ for a prehearing conference in the Maritime hearing proceeding. In support, SCRRA states only that, since its plea for relief is intended to remove its PTC-related applications and SCRRA from the Maritime hearing, no purpose would be served by requiring SCRRA to appear at the prehearing conference.

8. There is no merit to SCRRA's request for a stay. A request for stay requires that the moving party demonstrate: (a) that it is likely to prevail on the merits; (b) that it will suffer irreparable harm absent a stay; (c) that grant of a stay will not substantially harm other interested parties; and (d) the public interest favors grant of a stay.⁹ SCRRA makes no claim that it satisfies any of these factors. Moreover, unless and until the Commission rules favorably and

⁷ In addition to the public policy benefits, *Jefferson Radio* serves as a deterrent because of the "awesome loss" a licensee would likely suffer from the revocation or non-renewal of a license. See *Stereo Broadcaster, Inc. v. FCC*, 652 F.2d 1026, 1030 (D.C. Cir. 1981).

⁸ As noted by SCRRA, it is well established that the Commission's *Jefferson Radio* policy precludes consideration of license assignment applications where a character issue has been resolved against the seller or is pending. See *Jefferson Radio v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

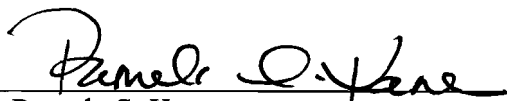
⁹ See, e.g., *In the Matter of WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263 (2010) (denying request for a stay when the moving party failed to satisfy its burden of proof in support of a stay)(citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

with finality on SCRRA's Showing, SCRRA should remain a party in this proceeding. As such, it should be bound by any rulings handed down by the Presiding ALJ, including those at the prehearing conference. Consequently, there is no basis for a stay of the Maritime hearing proceeding insofar as SCRRA's applications are concerned if the Commission does not act or is unable to do so by the June 15, 2011 prehearing conference.

9. Based on the foregoing, the Bureau has no objection to SCRRA's request to have its PTC-related applications removed from the ambit of the captioned hearing proceeding in EB Docket No. 11-71. However, it takes no position on whether the applications should be granted. In the event that the Commission should grant SCRRA's applications, any such grant should be expressly conditioned, as indicated above, on the following: (1) SCRRA and Maritime should deposit into an escrow account the proceeds from the proposed transaction; (2) the Commission should review and approve of the terms of the escrow agreement in advance; (3) the Commission should be a party to the escrow agreement; and (4) the deposited funds should be held in escrow until such time as the hearing proceeding in EB Docket 11-71 is resolved through all administrative and judicial appeals with finality. Moreover, the Bureau opposes a stay of the proceeding insofar as SCRRA's applications are concerned if the Commission does not act favorably on SCRRA's Showing by the date set for the prehearing conference in this proceeding.

Respectfully submitted,

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May 18, 2011

CERTIFICATE OF SERVICE

Ernestine Creech, a Paralegal Specialist in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 18th day of May, 2011, sent by first class United States mail, facsimile or by e-mail copies of the foregoing "ENFORCEMENT BUREAU'S CONSOLIDATED COMMENTS ON SHOWINGS FILED PURSUANT TO FOOTNOTE 7"

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